No. 138 (21)

Office - Supreme Court, U. S.
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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term 1942

THOMAS W. MORRELL, on behalf of himself and all other persons similarly situated,

Petitioner,

against

THE CITY OF NEW YORK, PELHAM ST. GEORGE BISSELL, as Presiding Justice of the Municipal Court of the City of New York; JOSEPH D. MCGOLDRICK, as Comptroller of the City of New York; GEORGE J. MCMAHON, as Clerk of the Municipal Court of the City of New York, Borough of Manhattan, Ninth District; ALMERINDO PORTFOLIO, as Treasurer of the City of New York; PAUL KERN, as President of, and FERDINAND Q. MORTON and WALLACE S. SAYRE, as members of and constituting the Municipal Civil Service Commission of the City of New York,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK AND TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

DAVID V. CAHILL,
Attorney for Petitioner.

INDEX

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Greater New York Charter	3
Statement	6
Reasons for Granting the Writ	9

ARGUMENT

I—Petitioner and the other persons similarly situated were deprived of salaries lawfully accrued and earned, without due process of law	9
II—The decision of the court below, upholds legislative action of the Board of Estimate of the City of New York, which impaired the obligation of contracts with petitioner and the other persons interested	12
Conclusion	14

TABLE OF CASES

Adams v. U. S., 20 ibid. 115	10
Chicago, Burlington & Q. R. Co. v. Chicago, 166 U. S. 226, 17 S. Ct. 581	10
Cissna v. Tennessee, 246 U. S. 289, 294	11
Crowell v. Randell, 10 Pet. 368	11
Dyer v. U. S., 20 ibid. 166	10
Minneapolis etc. R. Co. v. Rock, 279 U. S. 410, 412	11
Indiana ex rel. Anderson v. Brand, 303 U. S. 95	13
Northern Ohio Co. v. Ohio, 245 U. S. 574, 583-584	13

PAGE

Ross v. Oregon, 227 U. S. 150, 163 13

Sherlock v. U. S., 43 Ct. of Cls. 161 10
St. Louis, etc. Ry. Co. v. Starbird, 243 U. S. 592, 594 .. 11
St. Paul Gas Light Co. v. St. Paul, 181 U. S. 142, 148 .. 13

Whiting v. U. S., 35 ibid. 201 10
Williams v. Bruffy, 102 U. S. 248, 255 11

STATUTES:

Constitution of the United States
Amendment 14, Section 1 3

Greater New York Charter
Section 1373 ..... 3, 6, 10

Judicial Code
Section 237 ..... 2, 10

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK AND TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Court of

Appeals of the State of New York entered March 5, 1943 affirming the judgment of the Appellate Division of the Supreme Court of New York, First Judicial Department, and remitting the record and proceedings of the Court of Appeals to the Supreme Court of New York, New York County, there to be acted upon according to law.

Opinions Below

There was no opinion either in the Court of Appeals or in the Appellate Division of the Supreme Court. The opinion of the Supreme Court of the State of New York in this cause is printed at pages 105-106 of the record.

Jurisdiction

The jurisdiction of this court is invoked under Section 237 of the Judicial Code as amended by the Act of February 13, 1925 (Section 344 Title 28 U. S. C.).

Questions Presented

1. Whether the decision of the Court of Appeals affirming the decision of the Appellate Division of the Supreme Court and reversing the judgment of the trial court, worked a denial of due process in upholding the action of officials of the City of New York who arbitrarily and without any legal process refused to pay petitioner and others similarly situated salaries duly fixed and accrued according to law.

2. Whether the municipal authorities did not deprive petitioner and others similarly situated of property without due process by seeking arbitrarily to remove petitioner and others from their offices under cover of an attempted reclassification of the positions which they held.

3. Whether the failure of the proper municipal officials to certify the services rendered and the amounts due petitioner and the others similarly situated deprived them without due process of law of their right to the salaries accrued and the positions to which they had been appointed.

4. Whether the legislative action of the Board of Estimate of the City of New York, upheld by the decision below, impaired the obligation of contracts with petitioner and the other persons interested.

Statutes Involved

Amendment 14, Section 1 of the Constitution of the United States.

> "* * * Nor shall any State deprive any person of life, liberty, or property, without due process of law."

Greater New York Charter

Section 1373. The clerks, deputy clerks and assistant clerks, stenographers, interpreters, attendants and other employees of the municipal court of the city of New York in office when this act takes effect shall continue to hold office for the remainder of the respective terms for which they were appointed. There shall be a clerk and a deputy

clerk in each district. The total clerical force of each district, including collectively a clerk, a deputy clerk and, where there is more than one justice, assistant clerks, shall be equal numerically to at least twice the number of justices thereof, provided, however, that the board of justices or the justices of the district may assign an assistant clerk temporarily to any district in any borough in the event of an emergency requiring such action. The successors of any clerks, deputy clerks or assistant clerks at the time this act shall take effect, shall be appointed in each district by the justice or justices thereof for a term of six years from the date of appointment. The clerks, deputy clerks and assistant clerks shall receive a salary of three thousand dollars per annum. If the said justice or a majority of said justices fail to agree upon such appointment within thirty days after the vacancy occurs then the justices in the borough containing such district, or a majority of them shall make such appointment. Nothing herein shall be construed to prevent a clerk succeeding himself by appointment. The Board of Estimate and Apportionment shall, on the recommendation of the board of justices, prescribe the number of assistant clerks, stenographers, interpreters, attendants and other employees of the said court for each borough and shall fix their respective salaries, except as herein specifically provided.

There shall also be a clerk to each justice of such court. Such clerk and his successors shall be appointed by such justice and shall hold office during the pleasure of such justice. The salaries of such clerks shall be fixed by the board of estimate and apportionment of such city.

The justice or justices or board of justices upon making an appointment to any of the offices in this act provided for shall make duplicate certificates of such appointments stating the term of the appointment and when it will expire, and one of such duplicates shall be filed in the office of the city clerk and the other with the secretary of the board of justices. All stenographers, interpreters, and attendants shall continue in their respective positions without reappointment and the board of justices shall from time to time prescribe their duties and assign them to service in the respective districts within the borough in which is located the district for which they shall have been appointed; but a stenographer shall act in the part of the court in which the justice appointing him may sit.

Before entering upon his duties, each clerk, deputy clerk and assistant clerk shall file in the office of the comptroller of the etiy of New York, a bond in the penal sum of five thousand dollars, conditioned for the faithful discharge of his duty and the due accounting for and payment of all money by him received or with him deposited as such clerk, deputy clerk, or assistant clerk to be approved by the comptroller by endorsement thereon. For any breach of said bond the Appellate Division of the Supreme Court in the judicial department wherein the district is situated for which such clerk, deputy clerk or assistant clerk is appointed may order the same to be prosecuted in the name of any person damaged by such breach. Neither the clerks, deputy clerks, assistant clerks nor any other employees of this court shall receive any fee or compensation whatever for their own use for any services performed by them by virtue of their offices other than their salaries.

No clerk, deputy clerk, assistant clerk, or other employee of this court shall hold any other office or be interested in any other business except as permitted by this act, but shall give his whole time to his respective duties and shall reside in the borough in which the district for which he was appointed is situated. The justices of the respective districts or a majority of them, if there be more than one, may remove any of the said assistant clerks, attendants, stenographers, or interpreters, provided that before removal such officers shall have notice of the cause of their proposed removal and an opportunity to make an explanation; and the reasons for any removal shall be briefly entered on such minutes.

Statement

The plaintiff Morrel and the other persons similarly situated were duly appointed Assistant Clerks of the Municipal Court of the City of New York, Borough of Manhattan, Ninth District, pursuant to the provisions of Section 1373 of the Greater New York Charter at salaries of $3,000.00 per annum payable in semi-monthly installments. The City of New York was obligated by law to pay the salaries of Assistant Clerks of the Municipal Court of the City of New York. The appointment of Morrell was for the period September 16, 1932 to December 31, 1936, to fill the unexpired term of a predecessor in the office of Assistant Clerk. The persons similarly situated were similarly appointed for varying terms, all to end on December 31, 1936. Mr. Morrell and the others entered upon the performance of their duties and were paid their salaries

to the 31st day of December, 1933 at rates of compensation below the amounts fixed by law. In the case of Mr. Morrell, he received compensation at the rate of $2,810.00 per annum from January 1, 1933 to February 28, 1933 and at the rate of $2,000.00 from March 1, 1933 to December 31, 1933 (Rec., fols. 166-168). In August, 1934 the Municipal Civil Service Commission adopted a resolution reclassifying the position of Assistant Clerk, Municipal Court, from the exempt to the competitive class (Rec., fol. 206). This was subsequently approved by the State Commission. However, the status of the plaintiff and others similarly situated was not affected by this action. It would apply to their successors.

On January 1, 1934, the Board of Estimate of the City of New York dropped the plaintiff and the others from the City budget by making no provision for the payment of their salary in the budget. The justices who were empowered to make appointments never took any action for the abolition of the positions and rested on their original appointments of the petitioner and the other clerks.

It is urged that change from exempt to competitive classification does not deprive incumbents of their offices.

Since December 31, 1933 they have received no salary whatever and it is alleged in the complaint that petitioner continued to perfom the duties of the office and receive no pay therefor (Rec., pp. 56-57) and has earned nothing in outside employment since that date (Rec., fol. 170) and that the other persons have earned nothing except certain amounts specified in the complaint.

The complaint seeking a judgment for the amounts of the salary accrued and a mandate from the court directing the appropriate officials to certify the plaintiff and the other clerks and their salaries was filed in the Supreme Court of the State of New York (Rec., pp. 5-27). As will be seen from the title of the proceedings, the City of New York and various officials of the City of New York qua officials were the defendants. The Corporation Counsel of the City of New York appeared and answered for all of the defendants (Rec., pp. 28-48). The cause was tried before Honorable Kenneth O'Brien, Justice of the Supreme Court of New York, and judgment was entered in favor of the plaintiff Morrell for the sum of $63,598.90, together with costs and disbursements. The other persons mentioned in the complaint had assigned their claims to the plaintiff Morrell. An opinion was rendered in the trial court, which is found at pages 105 to 106 of the record.

The defendants appealed to the Appellate Division of the Supreme Court (Rec., pp. 2-3) from the said judgment and it was reversed by that court without an opinion.

The petitioner appealed to the Court of Appeals, which is the highest court of the state and that court affirmed the judgment of the Appellate Division on March 4, 1943.

The papers were returned on remittitur to the Supreme Court for the County of New York and that court now has the record and all of the proceedings remitted to it by the Court of Appeals. The order of the Supreme Court on remittitur is printed at the end of the record.

The essential facts were conceded by stipulation (Rec., pp. 58-59, 69-70).

Reasons for Granting the Writ

1. There is an arbitrary deprivation of property in this case of a type, which unless checked, might be employed in thousands of instances throughout the states for political, personal and other reasons. The appointees of judges as clerks and of many other appointees by other officials can be removed at will by those who are temporarily in power and the right to tenure of their offices might be disregarded at will. The question presented is of wide application and there is no decision of this court, which disposes of the precise question here presented.

2. Insofar as the Board of Estimate of the City of New York, which is *pro tanto* a legislative body, attempted by omitting plaintiff and the others from its budget to abolish their positions, it enacted a measure which impaired the obligation of employment contracts. This negative procedure if allowed to go unchecked would be an effective means of ousting from their positions court officials and other employees of the state and local governments.

ARGUMENT

I.

Petitioner and the other persons similarly situated were deprived of salaries lawfully accrued and earned, without due process of law.

The petitioner and the others were appointed Assistant Clerks in several districts of the Municipal Court of the

City of New York by the justices of the several districts under the power vested in them by the Greater New York Charter, Section 1373. The appointments were approved by the Municipal Civil Service Commission. The appointment of Morrell was for the period from September 16, 1932 to December 31, 1936 and he continued to hold the position thereafter, because the position was not abolished and no successor was lawfully appointed. The others were appointed at various times also for definite term (Complaint, Rec., pp. 5-28). The justices who had the power of appointment did not abolish the positions. The Board of Estimate of the City of New York attempted to abolish the position of plaintiff and others, not by direct legislative action, but by failing to appropriate money for their salaries. Obviously this method of terminating public office is without warrant of law. The plaintiff and others continued to render services, but received no pay.

The right to salary is property to which the due process clause applies:

Sherlock v. *U. S.*, 43 Ct. of Cls. 161;
Whiting v. *U. S.*, 35 ibid. 201;
Dyer v. *U. S.*, 20 ibid. 166;
Adams v. *U. S.*, 20 ibid. 115.

A judgment of a state court, whereby private property is taken without compensation, violates the Fourteenth Amendment. *Chicago, Burlington & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 17 S. Ct. 581.

Under Section 237, * * * "a case is reviewable in this court where any title, right, privilege or immunity is claimed under a statute of the United States, and the deci-

sion is against the title, right, privilege or immunity especially set up or claim by either party under such statute."

While there was no Federal question raised in specific language in the courts below, the question of due process, necessarily underlying the complaint, was the basis of the suit and was necessarily decided by the Court of Appeals.

In the case of *St. Louis, etc. Ry. Co.* v. *Starbird*, 243 U. S. 592, 594 the court said:

> "It has never been required that a federal right must be denied in terms, but it has been uniformly held that it is sufficient if the state court necessarily denied it in the judgment rendered."

In the case of *Crowell* v. *Randell*, 10 Pet. 368, Mr. Justice Story said that the Federal question need not be raised or the decision on it made in direct terms and that it is sufficient "if it appears by clear and necessary intendment, that the question must have been raised, and must have been decided, in order to have induced the judgment."

In the case of *Cissna* v. *Tennessee*, 246 U. S. 289, 294, the court held that jurisdiction exists where the state court could not have reached its decision without deciding the Federal question.

The case of *Minneapolis etc. R. Co.* v. *Rock*, 279 U. S. 410, 412 quotes the essence of the rule applying to this cause from *Williams* v. *Bruffy*, 102 U. S. 248, 255:

> "Whenever the highest court of a state by any form of decision affirms or denies the validity of a

> judgment of an inferior court, over which it by law can exercise appellate authority, the jurisdiction of this court to review such decision, if it involves a Federal question, will, upon a proper proceeding, attach."

It is clear that in this case a device was employed by which the petitioner and the others similarly situated were effectively deprived of their offices and their salaries without any proceeding properly removing them from the office or terminating the employment. There is no question that petitioner reported for duty and performed the services. They were entitled to the salaries as a matter of contract and property right and have been deprived of them arbitrarily. The Fourteenth Amendment affords protection against such deprivation of property.

II.

The decision of the court below, upholds legislative action of the Board of Estimate of the City of New York, which impaired the obligation of contracts with petitioner and the other persons interested.

The action of the Board of Estimate in adopting a budget, which failed to provide funds for the salaries of petitioner and the others, is tantamount to legislation, leaving the offices in existence but depriving the occupants of their lawful salaries. The effect is the same as though the state legislature had enacted a law arbitrarily depriving these court clerks of their salaries, but not of their positions.

It makes no difference whether the state legislature or a local body enacts the legislation impairing the obligation

of the contract, so long as the enacting body had jurisdiction of the subject matter.

Northern Ohio Co. v. *Ohio,* 245 U. S. 574, 583-584;
St. Paul Gas Light Co. v. *St. Paul,* 181 U. S. 142, 148;
Ross v. *Oregon,* 227 U. S. 150, 163.

This court has exercised its supervisory power to review and reverse a judgment of the Supreme Court of Indiana upholding the termination of a school teacher's employment.

Indiana ex rel. Anderson v. *Brand,* 303 U. S. 95.

The factual situation there presented was not precisely the same as the situation in the instant cause, but the type of case is the same and the same principle applies. In the *Indiana* case this Court considered the reasons which might influence local legislators or other officials in terminating a contract of employment, including possible political, personal or other reasons, and pointed out that the police power of the state can properly be exercised only for public ends and the means chosen must be adapted to such ends. The arbitrary removal of petitioner and his fellow clerks, the appointees of the municipal judges, suggests, if it does not squarely realize, the potential dangers against which the Constitution was intended to safeguard public officers.

CONCLUSION

It is urged that the petition presents an important question of Federal law of wide application and public interest, because the means employed to deprive petitioner and the others similarly situated of their property are susceptible of wide application throughout the states, the decision of the state court is not in accordance with applicable decisions of this court on the subject of due process and the court in rendering such decision departed from the usual and accepted course of judicial procedure. For these reasons it is urged that the decision below requires the exercise of this Court's supervisory jurisdiction.

Respectfully submitted,

David V. Cahill,
Attorney for Petitioner.

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

August 5, 1943.

IGNATIUS M. WILKINSON,
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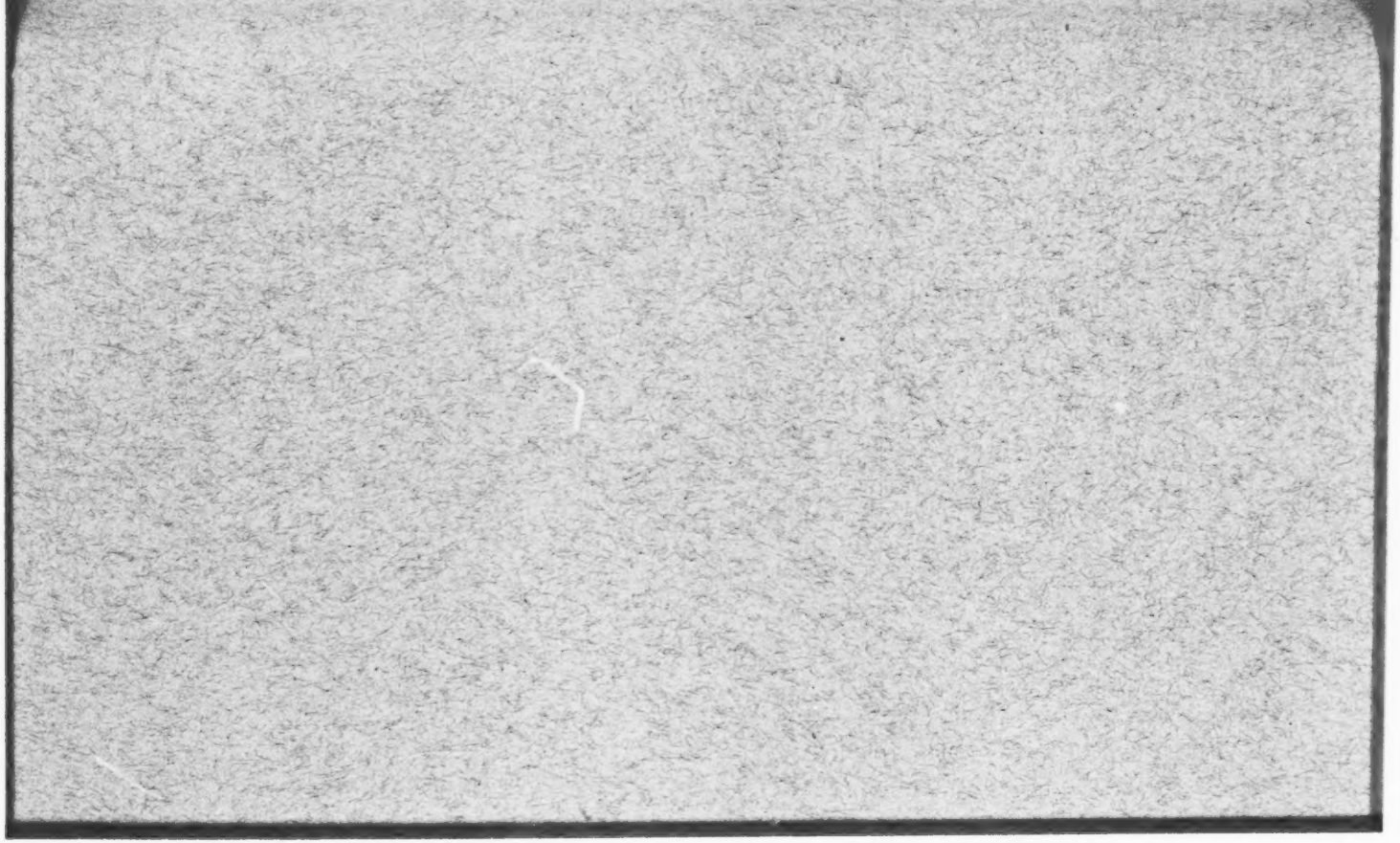
PAXTON BLAIR,
CHARLES F. MURPHY,
of Counsel.



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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

A group of municipal employees, aggrieved by the action of the Board of Estimate of the City of New York in omitting certain positions from the Budget for the year 1934, instituted an action at law for the salary which had been attached to the positions prior to their abolition. Relief was denied. 290 N. Y., mem. p. 62, 48 N. E. (2d) 708. The decision rests on non-federal grounds adequate to sustain it.

(1)

The controversy which petitioners seek to bring before this Court arose out of the action of the New York State

Civil Service Commission in refusing to reclassify certain municipal court clerkships from competitive to exempt, with the result that the positions could only be filled by persons who had taken a competitive examination. In adopting the 1934 Budget, now challenged because it made no provision (R., 46) for the petitioners, the Board of Estimate was without power to defy the State Civil Service Commission and to tolerate the continuance in office of employees, such as petitioners, who had not taken competitive examinations.

This subordination of municipal authority to state authority raises no federal question.

(2)

When an employee is left out of the budget, he cannot, under the law of New York, sue for his salary unless he first obtains an order of a competent court commanding the budgetary bodies of the City to restore the abolished position. *Thoma* v. *City of New York*, 263 N. Y. 402, 407 (1934). This principle of state law violates no federal right.

(3)

The exercise by the State of its power to abolish public offices raises no federal question. In *Newton* v. *Commissioners*, 100 U. S. 548 (1880), this Court said (p. 559):

> "The legislative power of a State, except so far as restrained by its own constitution, is at all times absolute with respect to all offices within its reach. It may at pleasure create or abolish them, or modify their duties. It may also shorten or lengthen the term of service. And it may increase or diminish the salary or change the mode of compensation. *Butler et al.* v. *Pennsylvania*, 10 How. 402."

This principle was reiterated in *Dodge* v. *Board of Education,* 302 U. S. 74, 78-79 (1937), and *Higginbotham* v. *City of Baton Rouge,* 306 U. S. 535, 538 (1939). There has accordingly been no violation of the obligation of contracts clause.

(4)

It is significant also that the petitioners are unable to show to this Court a certificate from the Court of Appeals to the effect that a question under the United States Constitution was raised and necessarily passed upon in deciding the appeal. For the form of such certificate which the Court of Appeals constantly uses in cases of this sort to facilitate the review of its determinations by this Court, see *People* v. *Kesbec, Inc.,* 282 N. Y. 777 (1940), and *People* v. *Beck,* 288 N. Y. 672 (1942), cert. den. 317 U. S. 696 (1943).

The New York Court of Appeals having decided the case without opinion, the absence of such a certificate is fatal, and would lead to the dismissal of the writ of certiorari even if it had already been granted. *McGoldrick* v. *Gulf Oil Corp.,* 309 U. S. 2 (1940). While in that case the defect was later supplied (309 U. S. 414), in the instant case it could not be supplied; for an examination of the brief filed in the Court of Appeals by the present petitioners shows that no federal question was raised by them in that court. The headnotes of that brief are: "I. Plaintiff and his assignors were duly appointed to their positions. II. The reduction of the salaries of plaintiff and his assignors to $2,000 per annum and their omission from the budgets for 1934 and subsequent years was illegal. III. The order was proper."

It would seem to be perfectly obvious that there is no federal question in the case, and that this Court is without jurisdiction to grant the writ.

Conclusion.

The petition for certiorari should be denied.

August 5, 1943.

Respectfully submitted,

IGNATIUS M. WILKINSON,
Corporation Counsel,
Counsel for Respondents.

PAXTON BLAIR,
CHARLES F. MURPHY,
of Counsel.

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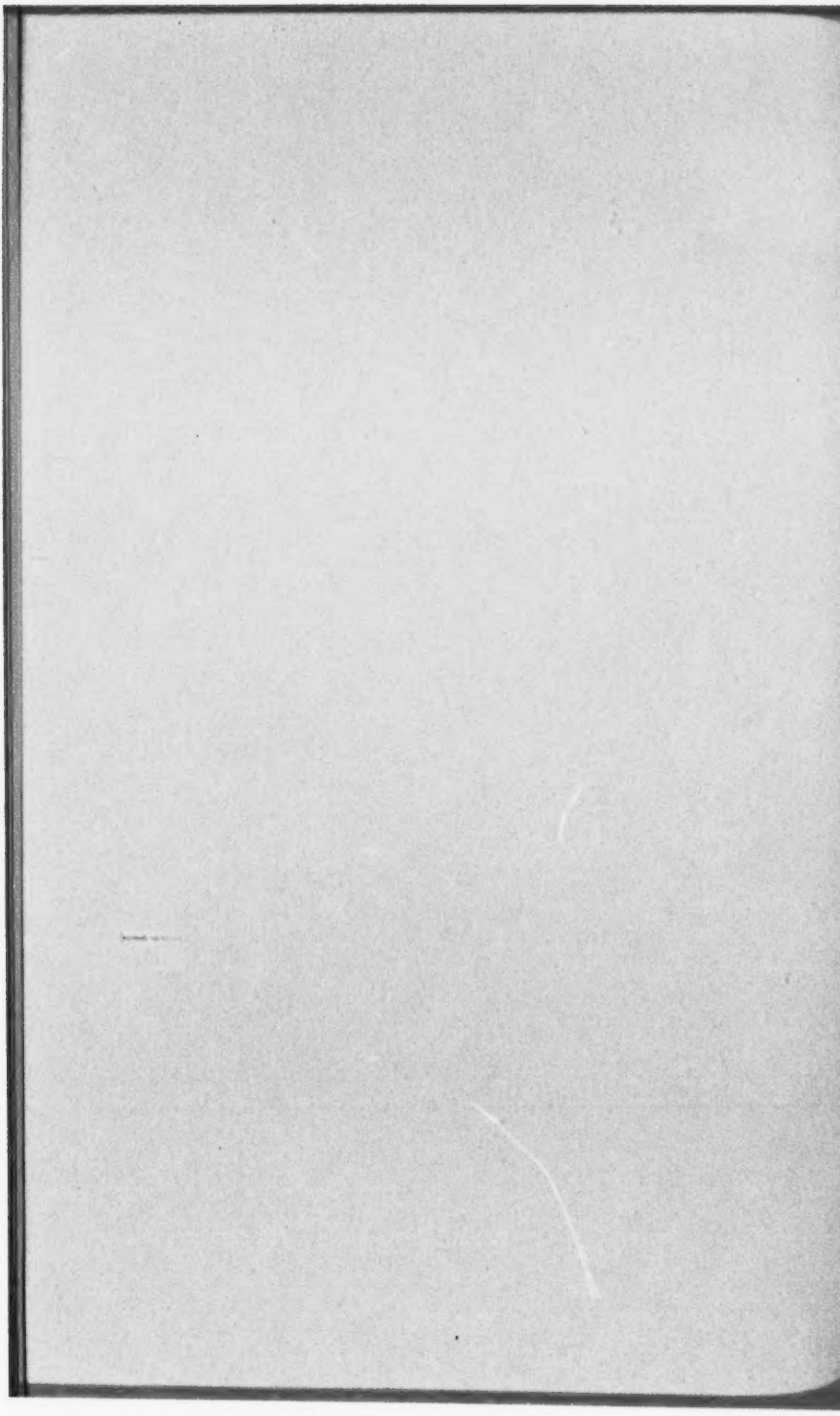
PETITIONER'S REPLY BRIEF

DAVID V. CAHILL,
Attorney for Petitioner.



INDEX

PAGE

1—The statement of the questions presented, as given in respondent's brief in opposition to the petition herein, is neither accurate nor complete 1

CASES CITED

Cissna v. Tennessee, 246 U. S. 289 6

Coombs, Matter of, v. Edwards, 280 N. Y. 361 4

Crowell v. Randell, 10 Pet. 368 6

Greene v. Knox, 175 N. Y. 432 2

St. Louis etc. Ry. Co. v. Starbird, 243 U. S. 592 6

Thoma v. City of New York, 263 N. Y. 402 5

STATUTES CITED

Greater New York Charter:
Section 1373 3

New York Civil Practice Act:
Article 78, Sections 1283-1285 4

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PETITIONER'S REPLY BRIEF

The petitioner respectfully submits the following brief in reply to the respondent's brief:

I.

The statement of the questions presented, as given in respondent's brief in opposition to the petition herein, is neither accurate nor complete.

(a) It is stated in respondent's brief that the Board of Estimate was without power to defy the State Civil Service

Commission and to tolerate the continuance of petitioner and others similarly situated in the office. It is urged that the subordination of municipal authority to state authority raises no federal question. The latter proposition is true, but petitioner has not contended that there is any such federal question in this case. The question here is whether petitioner and others similarly situated, after having been lawfully appointed as Assistant Court Clerks, could be deprived of their property right in their offices by the device of refusing to appropriate money for their salaries.

If there were any genuine question as to their title to office, it could have been raised only by a *quo warranto* proceeding.

Greene v. *Knox*, 175 N. Y. 432, 437.

It is not questioned in respondent's brief that petitioner and the other clerks were validly appointed. Petitioner's salary was paid from September 16, 1932 to December 31, 1933 (Record fols. 167-168). The others were similarly paid from the dates of their appointment, some as far back as January, 1931 (pp. 81, 83, 85, 87). Their appointments were shown by Plaintiff's Exhibit 1 (R. pp. 79-97). The appointment of Morrell was for an unexpired term beginning September 16, 1932 and to expire December 31, 1936 (p. 97). The others having been appointed in 1931, were paid until December 31, 1933. These appointments were made at a time when the offices were in the exempt class.

There is no question that their right to the offices and to the salaries attached to those offices constitutes property.

> "The salary of an officer is property, the right to which depends upon the right to the office, and the former cannot be constitutionally taken away until the latter is destroyed."

Greene v. *Knox*, supra.

Therefore, the federal question presented to this Court is not whether municipal authorities may be subordinated to state authorities, but whether a property right may be taken away without any proceeding whatever except a failure and refusal by the local legislative body to appropriate money for the salary.

It should be noted that the letter to petitioner notifying him of the action taken in this matter did not state that he had been removed from office or that the position had been abolished, but simply that the salary attached to the office had been eliminated from the budget. The letter from the President Justice of the Municipal Court read as follows:

> "I regret to advise you that I am in receipt of information from the Budget Director's office that your position will be eliminated from the budget for 1934" (R. p. 57, fols. 170, 171).

The Board of Estimate, which failed and refused to make the necessary appropriation, was not the body which made the appointments, nor did it have any control by law over such an appointment. The right of appointment was given by Section 1373 of the Greater New York Charter, a state law, to the justices of the court. The section of the Charter referred to has been set forth in full in our petition.

(b) Point 2 of respondent's brief, to the effect that a validly appointed employee of the City, who is refused his salary, although entitled to it by contract with the City, cannot sue for his salary, gives emphasis to the contention of petitioner not only that he is being deprived of a property right but that the obligation of a contract is being impaired. The contention of respondent is that petitioner must apply for an order of a competent court commanding the budgetary bodies of the City to restore the abolished position.

The first answer to this suggestion is that petitioner does not seek a restoration of an abolished position, but contends

that the position in question was never abolished. His prayer for relief (R. p. 27) asks for a money judgment for the amount of the salary due and also asks that the proper certification of the position which he held be made. The writ of mandamus and other similar writs have been abolished by the State of New York, but under Article 78, Sections 1283-1285, of the Civil Practice Act, appropriate orders directing the granting of certain relief are authorized, substantially as under the old procedure. However, there is no provision of state law which takes away from litigants like the present petitioner the right to sue on contract. If there were any such limitation of petitioner's right it would be unconstitutional under the circumstances of the case at bar. It is submitted that any such remedy as mandamus or a similar order would not be appropriate in this cause. No official or body could be commanded to pay a salary until he had established by appropriate action the right to the salary and that he had rendered services for the salary. There are numerous reported instances showing the application of the mandatory remedy; for example, the case of *Matter of Coombs* v. *Edwards*, 280 N. Y. 361. In that case a judgment-creditor, having obtained a judgment against the City of Long Beach, applied for an order to compel the appropriate city officials to include the amount of his unpaid judgment in the city budget. This obviously is a more appropriate case for the issuance of a mandatory order than the case at bar would be. However, even in that case the application for the order was denied and the court said of the remedy (p. 364):

> "It is employed only in cases where other remedies fail and the conditions surrounding its use are not found in the ordinary suit at law."

In this instance logically the petitioner was obliged to establish his right to the salary before he could apply to the court for an order directing its payment.

Respondents have cited *Thoma* v. *City of New York*, 263 N. Y. 402, 407. The case has no application to the case at bar. In that case the plaintiff, having been appointed an engineer at a salary of $3,008, was reduced to $2,760. However, it appears that in the grade to which he was appointed the salaries ranged from $2,760 to $3,008. Therefore, he was neither removed from office nor was his grade changed. In the discretion of the appointing officials the salaries were changed within the grade to which he was appointed, and the power of the officials to make the change of salaries was clear. The court's decision was simply that the action of the officials was lawful. There is a dictum to the effect that if the plaintiff in that case was unlawfully removed his remedy was by mandamus. In the case at bar there was neither a removal nor a demotion, but only a withholding of salary.

As the matter stands the validity of petitioner's appointment is conceded. There is no way of depriving him of his right to obtain the salary except by a proceeding to prove that he had no right to the office.

(c) The third point in respondent's brief discusses a question which has no point on this application. It is conceded that the state has power to abolish a public office under proper conditions. Petitioner's office was not abolished and his right to hold it continued, the validity of his appointment being conceded. What the City seeks in this case is to eliminate him from the office by refusing to pay his salary, and therefore to accomplish indirectly what could not be done directly, that is, to remove him without trial or process of any kind.

(d) As has been already demonstrated in the argument submitted with the petition, no formal certification to the effect that a federal question was raised in the state court is necessary. It has been expressly held that if the state

court necessarily passed upon the federal question it is available in this Court.

St. Louis, etc., Ry. Co. v. *Starbird,* 243 U. S. 592, 594;
Crowell v. *Randell,* 10 Pet. 368;
Cissna v. *Tennessee,* 246 U. S. 289, 294.

The form in which the matter was presented in petitioner's brief in the Court of Appeals is immaterial. The record of the Court of Appeals is before the Court and it shows clearly that in effect the questions now presented to this court were litigated and that this cause could not have been determined by the Court of Appeals without passing on those questions.

Respectfully submitted,

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